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NOTICE OF EX PARTE PRESENTATION

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 - 12th Street, S.W., TW-A325  
Washington, DC 20554

Re: Wireless Consumers Alliance, Inc.  
Petition for Declaratory Ruling  
File No. WT 99-263

Dear Ms. Salas:

Transmitted electronically herewith for filing is a copy of a written *ex parte* presentation provided by representatives of the Wireless Consumers Alliance, Inc. to Chairman Kennard's staff at their meeting on Thursday, June 15, 2000, and to Commissioner Powell and his staff on Friday June 16, 2000.

Very truly yours,

s/ Kenneth E. Hardman  
Kenneth E. Hardman

Enclosure

**STATEMENT OF WIRELESS CONSUMERS ALLIANCE  
IN SUPPORT OF PETITION FOR DECLARATORY RULING  
THAT SECTION 332 OF THE COMMUNICATIONS ACT  
DOES NOT PROHIBIT STATE COURTS FROM  
AWARDING MONEY DAMAGES AS PROVIDED BY  
STATE CONSUMER PROTECTION STATUTES**

Wireless Consumers Alliance ("WCA") has filed a Petition for a Declaratory Ruling that Section 332(c)(3)(A) of the Communications Act of 1934, or the jurisdiction of the Federal Communications Commission, does not preempt state courts from awarding monetary relief against commercial mobile radio service ("CMRS") providers (a) for violating state consumer protection laws prohibiting false advertising and other fraudulent business practices, and/or (b) for breaches of contract or other tortious acts prohibited by state law. Section 332(c)(3)(A) provides:

[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A).

In November, 1999, the FCC issued an Order in a related, but competing, Petition filed by Southwestern Bell Co. ("SBC") and, in paragraphs 23-24 of that Order, stated explicitly that state consumer protection laws, including contract, are not preempted by Section 332. However, the Commission explicitly reserved for its ruling on our Petition the question of whether the remedies provided under state consumer protection laws - especially money damages - constituted "rate setting" and were therefore preempted. The net effect of the November, 1999 ruling is that it remains for the Commission to

determine the very narrow, but critical, question of whether state consumer protection laws will have teeth by being able to seek money damages as a remedy.

Recent case law has demonstrated that state courts have correctly interpreted the FCA to permit an award of damages for CMRS providers' violations of state consumer protection and contract laws. Those courts have explicitly held:

"In their [Complaint, plaintiffs] claimed that AT&T engaged in 'deceptive, fraudulent, misleading and/or unfair conduct' by not disclosing its practice of 'rounding' airtime in order to 'induce cellular customers to use its cellular service, and/or in order to unfairly profit.'"

Tenore v. AT&T Wireless Services, Inc., 136 Wn. 2d 322, 327 (1998).

"[N]ot only are there no tariffs on file, but the two purposes behind the 'filed rate' doctrine preserving an agency's primary jurisdiction to determine the reasonableness of rates and insuring that only those rates approved are charged do not apply in this case."

Tenore, at 334.

"The award of damages is not per se rate regulations, and as the United States Supreme Court has observed, does not require a court to 'substitute its judgment for the agency's on the reasonableness of a rate.' Any court is competent to determine an award of damages."

Tenore, at 344-45.

"As we have alluded to previously, section 332(c)(3)(A) does not preempt a plaintiff from maintaining a state law action in state court for an alleged *failure to disclose* a particular rate or rate practice; section 332(c)(3)(A) only preempts a state law action challenging the reasonableness or legality of the particular rate or rate practice itself."

Ball v. GTE Mobilnet of California, 00 C.D.O.S. 4523 (Cal. App., June 8, 2000).